

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

City of Punta Gorda,

Permittee

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NPDES Permit No. FL0039055

ORDER GRANTING MOTION
FOR PARTIAL SUMMARY DETERMINATION

This order rules upon a motion dated July 27, 1992 filed by Region IV of the Environmental Protection Agency ("EPA"). The motion seeks a determination that the City of Punta Gorda's ("City") wastewater treatment facility located in southern Florida is subject to the advanced wastewater treatment requirements mandated by the Florida statute known as the Grizzle-Figg Amendments. Fla. Stat. ch. 403.086 (1987).

Essentially, EPA says that the state regulatory authority has found the City's facility to be subject to the state requirements and that there is no need or authority for the EPA to litigate and decide the issue.

The City filed an Answer in opposition to the motion. In its Answer, the City says that the Grizzle-Figg Amendments do not apply to it because the statute does not cover plants discharging into portions of the Peace River above tidal influence. The City maintains that its discharge point is above the tidally influenced portions of the Peace River.

The City argues that whether the Florida statute applies to its facility is a question of fact that needs to be developed at an evidentiary hearing and that the EPA is the proper forum and body for making such a determination.

The EPA argues that any question that the City may have as to the applicability of the Florida statute raises an issue of state law which is more properly before a state agency or state court.

First, some background.

The City filed with the EPA for a National Pollutant Discharge Elimination System permit to operate its wastewater treatment facility. On September 28, 1989 the EPA issued the final draft of the permit which included effluent limitations required by the state of Florida under the terms of the Grizzle-Figg Amendments.

In a letter dated December 1, 1989, the Florida Department of Environmental Regulation ("FDER") advised the City that based upon review of information regarding the discharge from the City's wastewater system, the FDER had concluded that the discharge is in the area covered by the Grizzle-Figg Amendments.

By letter dated December 28, 1989 the City took exception to FDER's position and requested a determination once again that the City is exempt from the Grizzle-Figg Amendments.

In a February 1, 1990 letter addressing the City's request for exemption, FDER reaffirmed its position that the City's wastewater system was subject to the Grizzle-Figg bill restrictions and that the City had until October 1, 1990 to bring its system into compliance with the law. The February 1, 1990 letter also advised the City that it could request an administrative hearing to challenge this determination pursuant to FLA. STAT. ch. 120.57.

The EPA argues that the February 1, 1990 letter sent to the Respondent from the Deputy Assistant Secretary of the Southwest District of the FDER unequivocally establishes the Respondent's obligation to comply with the requirements of the Grizzle-Figg Amendments and thus there is no genuine issue of material fact. In addition, the EPA contends that the question raised by the Respondent is a question of state law that should properly be determined before a state agency or court. EPA cites the case of Burford v. Sun Oil Co., 319 U.S. 315 (1943) as support for its proposition.

The Burford case counsels that Federal agencies and courts should abstain from interfering with state administrative policy matters, especially when there is a state judicial process available to adjudicate the matter. EPA argues that the City had the opportunity to address this matter through the state judicial process pursuant to FLA. STAT. ch. 120.57 or ch. 120.565, but chose not to do so.

The City argues that although the Burford case requires that federal courts do not interfere with matters of intricate state policy such as ratemaking, the issue of this case is to determine the, "geographical and jurisdictional boundary of an area" and therefore, it is not the normal discretionary issue to be decided by the state.

The Clean Water Act ^{1/} recognizes a state's right to adopt standards or limitations respecting discharges of pollutants that are more stringent than those adopted by the federal government.

^{1/} Section 510, 33 U.S.C. § 1370.

The state is also permitted to certify for inclusion in federal permits, those limitations that it deems necessary to meet applicable state water quality standards. ^{2/} Once certified by the state, the EPA is required to include those limitations or requirements as conditions in the Federal permit. ^{3/} In the absence of state certification, as in the instant case, the EPA remains obligated to include in the Federal permit any more stringent limitations established pursuant to any state law or regulation. ^{4/}

Here the EPA acted properly in including the requirements of the Grizzle-Figg Amendments in the Federal permit. There is nothing on the face of the Grizzle-Figg Amendments which suggests that they would not apply to the City. Further, the EPA's inclusion of the state's requirements is consistent with the state's regulatory's view that the City's wastewater treatment facility comes within the purview of the Amendments.

Determining whether the discharge from the City's wastewater treatment system fits within the geographical boundaries as defined in the Florida statute is an issue more appropriately decided by the state. If issues such as this were ruled upon separately by state and federal authorities it could very well lead to inconsistency and conflict in the application of state law and the public policy underlying that law. This lack of uniformity is exactly what the court's decision in Burford sought to prevent. That decision remains the prevailing law.

The case, Taffet v. Southern Co., 930 F.2d 847 (11th Cir. 1991), cited by the City does not compel any different conclusion. In Taffet, the court applied a rule of statutory construction commonly referred to as the "clear statement doctrine". The rule advises that, "a federal court should not apply a federal statute to an area of traditional state concern unless Congress has articulated its desire in clear and definite language to alter the delicate balance between state and federal power by application of the statute to that area." Id. at 851.

There has no been no showing that Congress, in the Clean Water Act, attempted to alter the "delicate balance" referred to by the Court in Taffet. Indeed, as noted previously, the Clean Water Act recognized and reemphasized the state's rights to have its own requirements included in the federal permit.

^{2/} Section 401, 33 U.S.C. § 1341.

^{3/} Section 401(d), 33 U.S.C. § 1341(d).

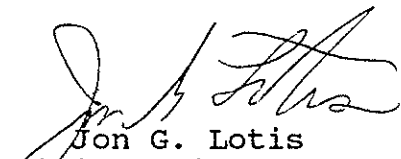
^{4/} Roosevelt Campobello International Park Commission v. United States Environmental Protection Agency, 684 F.2d 1041, at 1056 (1st Cir. 1982).

City argues that since the EPA regulation, 40 C.F.R. § 124.74, requires a review of all issues in a proceeding, the jurisdictional issue must be heard. An EPA regulation cannot be interpreted in a manner inconsistent with the agency's underlying enabling statute. The review referred to in 40 C.F.R. § 124.74 can only be of those matters which the Clean Water Act designates as within the jurisdiction of the EPA. The Clean Water Act does not empower the EPA to review a state's decision as to whether a particular facility comes within the reach of a state statute.

In these circumstances, the City's recourse (if any is still available) for challenging the state's determination of the applicability of Grizzle-Figg Amendments is through the appropriate state channels.

The EPA motion is granted.

One issue remains for disposition that is not subject to EPA's motion--whether the effluent sampling locations set forth in the permit are appropriate. The parties are encouraged to attempt to settle this matter. The advantages of a negotiated settlement may far outweigh the time, and expense associated with further litigation of this issue. To that end, the parties shall file with the undersigned on or before September 24, 1993 a joint report on the status of those discussions.


Jon G. Lotis
Administrative Law Judge

Dated: August 3, 1993
Washington, D.C.

IN THE MATTER OF CITY OF PUNTA GORDA, Permittee
NPDES Permit No. F10039055

CERTIFICATE OF SERVICE

I certify that the foregoing Order Granting Motion for Partial Summary Determination, dated August 3, 1993, was sent in the following manner to the addressees listed below:

Original by Facsimile and
by Regular Mail to:

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Regional Hearing Clerk
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Agency, Region IV
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Dated: August 3, 1993
Washington, D.C.